AlliedSignal Aerospace, a Division of Allied Signal, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Local 376 and International Union, United Automobile Aerospace & Agricultural Implement Workers of America, UAW, Local 1010. Cases 34–CA–7266 and 34–CA–7302

April 12, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On April 21, 1997, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the General Counsel filed a brief answering the Charging Party's exceptions, the Respondent filed cross-exceptions and a brief both answering the General Counsel's and the Charging Party's exceptions and in support of its cross-exceptions, the Charging Party filed a brief answering the Respondent's cross-exceptions, and the Respondent filed a brief in reply to the Charging Party's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

As explained in detail below, the issues in this case arose out of the Respondent's termination, at midterm, of a job-protection agreement (the competitiveness agreement or "the CA" herein); its subsequent decision to relocate unit work from its Stratford, Connecticut plant to its plant in Phoenix; and its refusal to bargain with the collective-bargaining representatives of its unit employees over that decision and (at least initially) to provide requested information about that decision. The judge found that the Respondent had a "sound arguable basis" for concluding that it was free to terminate the CA, and he found no violation in the termination. He went on to find that the work-relocation decision was a mandatory subject of bargaining, and that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain over that decision and promptly to supply requested information about it.

For the reasons stated below, we reverse the judge's finding concerning the CA, and conclude that the Respondent violated Section 8(a)(5), (1), and (d) of the Act by terminating it at midterm. Because the Respondent was not free, while the CA was in effect, to transfer work out of the Stratford plant, we find it unnecessary to reach the decision-bargaining and information-request allegations. The Respondent's obligation during the time at

issue here was not to bargain with reference to a relocation decision, but rather to adhere to the terms it agreed to in the CA.

1. An overview of the facts relevant to the CA issues

Since 1994, the Respondent has operated a plant in Stratford, Connecticut, which manufactures engines for both military and commercial sale. It is usually referred to as the "Stratford Army Engine Plant" ("the SAEP" or "the Stratford Plant" herein) because of its primary purpose historically as a military contracting operation. The plant property is owned by the United States Government; it is, at least technically, a military base. The Respondent, like its recent predecessors, Textron, Inc., for example, operates the SAEP under a lease from the Government permitting "dual use," i.e., permitting both military and commercial engine production. Starting in the early 1990's, prior to the Respondent's acquisition of the plant operations, the SAEP's military engine program began to shrink because of dwindling demand from the Department of Defense (DOD) for engines. Accordingly, the overall production trend began to shift toward commercial contracts, but without a corresponding increase in such contracts. By 1994, when the Respondent purchased the engine operations, 30 percent of the plant's production was commercial and 70 percent was for military use. Most of the military contracting involved the AGT 1500, a turbine engine for the Abrams M1 tank.

The Respondent began to consider purchasing the engine-manufacturing business at the SAEP from Textron in late 1993; the transaction was finalized in late October 1994. An important factor in the Respondent's decision to buy the engine business was the spring 1994 report of a "blue ribbon panel" of the Defense Science Board, an agency under the aegis of the DOD. The report included a recommendation that the SAEP be continued long term as a dual-use facility, rather than shut down, and that the production and maintenance program for the AGT 1500 be continued indefinitely on a "standby" basis, with annual Federal appropriations for its support in excess of \$20 million.¹

The process leading up to the formal purchase from Textron went on for much of 1994. During the spring, Textron's collective-bargaining agreements with UAW Locals 1010 and 376 expired, and Textron was negotiating successor agreements with the Locals.² The Respondent was a very interested observer in the negotiations; it had made clear to Textron that a condition of the pending sale was the conclusion of a basic collective-bargaining

¹ "Standby" status involves preservation of engine-production capability in the absence of active production of new engines; it includes engine maintenance and the production of spare parts for the engines.

² Local 1010 represents the Stratford plant's production and maintenance employees, and Local 376 represents a unit at the plant of technical and clerical support staff employees. Because the issues we address here involve both Locals without significant difference, for convenience we will refer to them collectively as "the Union" in this decision.

agreement acceptable to the Respondent. The Respondent's plan was to adopt this agreement and succeed Textron as the Union's collective-bargaining partner when the sale was finalized. In June, while negotiations were under way, an internal AlliedSignal memorandum circulated in the plant. It clearly raised the possibility that the Respondent would shut down the plant after its purchase because of diminishing DOD demand for new tank engines. The Union had already been concerned that the Respondent's ultimate intention was to move the Stratford manufacturing operation to the Respondent's existing commercial engine plant and corporate headquarters in Phoenix. Dissemination of the Respondent's memorandum brought the collective-bargaining negotiations to a virtual standstill.

To show that a shutdown of the plant was neither contemplated nor inevitable, and thus to get the negotiations back on track, the Respondent and Textron offered the Union an initial draft of the CA. The Respondent explained that this proposed agreement would establish the basis for keeping bargaining unit work in the Stratford plant upon the Respondent's purchase. In July, the Union reached agreement with Textron on the CA, on a successor bargaining agreement, and on an "effects bargaining agreement," all with the same duration—retroactively effective from May 30, 1994, until June 6, 1997. The Respondent, as previously understood, assumed all of the agreements when its purchase of the SAEP engine operation was completed in late October 1994.

In essence, the CA was an agreement between the Union and the Respondent that, upon purchase, the Respondent would maintain unit work at the Stratford plant if agreed conditions were met. Thus, the parties agreed broadly to seek together to improve the competitive status of the plant in the economic context of diminishing military contracts and intense commercial competition. It contemplated commitments by the Union to cooperate in seeking and carrying out cost-cutting measures for more efficient production. In short, the parties would try to shift the plant's primary manufacturing focus from military contracting to production for commercial sale, and to enhance the latter, in order to safeguard the business future of the plant and the unit employees' jobs.

One very important condition in the CA concerned acquisition of adequate Federal funding to maintain the plant's "standby status" for the AGT-1500 program. Section 6 of the CA, in relevant part, sets forth in detail this condition, the parties' obligations thereunder, and the Respondent's related right to terminate the CA prior to its expiration date:

Should AlliedSignal purchase [Textron's] assets, AlliedSignal intends to make application to appropriate officials of the United States Government for financial arrangements in an amount considered by AlliedSignal to be adequate to support the future of the Stratford plant by AlliedSignal on a standby basis for the production of the AGT1500 engine, if active procurement of that engine should cease. AlliedSignal and the Union shall exert their best efforts to work together and to coordinate actively in the efforts to obtain such adequate financial arrangements from either the federal government or some other alternative governmental funding source. [Emphasis in original.]

AlliedSignal will share cost data and other backup information with the Union at least sufficient to provide an understanding of the calculation of the amount sought from the Government and to enable the Union to act effectively in support of the application with appropriate officials. It is the intention of the parties to work together so as to make a persuasive case for the continued viability of the Stratford Plant and the bargaining unit operational capability.

After AlliedSignal makes such an application to the Government, if no provision to fund such financial arrangements in the amount sought by Allied-Signal shall be made in the federal budget as next thereafter enacted by the Congress of the United States, then at any time after such next enactment of a federal budget, AlliedSignal may terminate this Competitiveness Agreement. Such termination shall be accomplished only upon notice given by Allied-Signal to the Union in writing no less than ninety (90) days before the intended effective date of such termination.

In the summer of 1994, even before its purchase of the SAEP operation was final, the Respondent lobbied Congress for DOD appropriations that would benefit the Stratford plant. In September, Congress appropriated \$47.5 million to the DOD in the fiscal-year 1995 budget for the AGT-1500 program at the plant. However, the DOD did not release these funds immediately for use at the SAEP. Meanwhile, the Respondent and the Union began implementation of the terms of the CA at the plant.

In February 1995, the Secretary of Defense announced his department's recommendations for the closure of a large number of military bases within the United States. In what apparently was a surprise to all concerned, the SAEP was on the list of recommendations. The DOD presented the list to the Defense Base Closure and Realignment Commission, commonly known as the BRAC Commission, for further evaluation and final recommendations to President Clinton. Once it sent its recommendations to the BRAC Commission, the DOD became

³ The "effects bargaining agreement" addressed severance pay matters negotiated by the parties which are not at issue in this case.

⁴ This 1995 appropriation included \$17 million which had been appropriated in fiscal year 1994 for the SAEP, but which the DOD had withheld from Textron.

reluctant to release the \$47.5 million in appropriated funds for use at the SAEP. It is apparent that there was significant internal disagreement at the DOD over whether expenditure of these funds was prudent in light of the BRAC Commission's ongoing evaluation. The Respondent and the Union lobbied the DOD and members of Congress for release of the funds. In mid-April, the DOD authorized disbursement of the funds.

In late June 1995, the BRAC Commission recommended to the President that the SAEP be "closed." It is undisputed that all interested parties understood at that time that the recommendation would be effectuated, and in fact, the President subsequently approved it on July 13. In late June and again in July, the Respondent explained to the Union and the unit employees that, due to the BRAC decision, it was considering relocation of the Stratford manufacturing operation to Phoenix for consolidation. It identified a \$30 million annual shortfall in funds should the Respondent remain in Stratford rather than consolidate in Phoenix. The Union responded that any transfer of unit work from the SAEP would violate the CA.

Through the remainder of the summer, the Union, members of Congress, and local government officials engaged in a search for alternative government funding at the state and local level to cover the \$30 million shortfall asserted by the Respondent. Ultimately, this effort was fruitless. On September 29, 1995, the Respondent notified the Union that it was putting into effect the termination provisions of section 6 of the CA. Subsequently, the Respondent made clear that it had in fact decided to relocate the Stratford engine operation in Phoenix.

The record establishes some significant points concerning a BRAC base closure determination. It does not mean an immediate, physical shutdown of the base. Rather, the DOD must initiate a closure process no more than 2 years after the date of the President's approval of the recommendation, and it must complete the process no more than 6 years after that date. The process itself involves a gradual relinquishment of the DOD's responsibility for the property to civilian entities, either private or governmental. In general, it amounts to a transition program wherein the property is converted from military to civilian use. With regard to the SAEP, the DOD was required to initiate the closure process by mid-July 1997 and complete it by mid-July 2001.

2. The judge's decision and the exceptions

On the question of whether the Respondent violated the Act by prematurely terminating the CA, the judge focused on a dispute between the parties over the proper interpretation of part of section 6. The Union and the General Counsel contended that the Federal Government funding provisions required just one round of appropriations in a single Federal budget year, i.e., fiscal year 1995. Thus, in their view, the Respondent was adequately funded with \$47.5 million through the June 6, 1997 expiration of the CA. The Respondent argued that those provisions actually required yearly appropriations in successive Federal budget years, and that the \$47.5 million was adequate for only 1 year. The judge determined that there was no need to definitively interpret the contract language at issue because the Respondent's interpretation had a "sound arguable basis" pursuant to NCR Corp., 271 NLRB 1212, 1213 (1984). Accordingly, he dismissed the allegation that the termination of the CA was unlawful, and he proceeded to address the "decision-bargaining" question, as set forth in detail in the attached decision.

The General Counsel, the Union, and the Respondent all excepted to different aspects of the judge's recommended decision and remedy. The Union excepted, inter alia, to the judge's failure to account for the fact that the Respondent did not fulfill the prerequisites to termination set out in section 6, even assuming that the Respondent's annual funding version of the disputed contract language is correct. The Union points especially to the Respondent's failure to "make application" to the Federal Government for funding for fiscal year 1996, and its failure to share information with the Union concerning the amount of Federal funding the Respondent had determined it would need in that year. We agree that the Respondent did not follow the steps required by Section 6 to permit early termination of the CA, and that, as a result, the Respondent violated Section 8(a)(5) by its midterm termination of the CA.

Discussion

A party to a collective-bargaining agreement contravenes Section 8(d), and violates Section 8(a)(5), when, at midterm of the agreement, it unilaterally modifies or terminates contract provisions which are mandatory bargaining subjects. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 185-186 (1971). See also, e.g., C & S Industries, 158 NLRB 454, 458 (1966). The essential design of the CA was the protection of jobs; i.e., the preservation of bargaining unit work for unit employees in threatening economic circumstances. Preservation of unit work for unit employees is "[a]mong the primary purposes protected by the Act," NLRB v. Longshoremen, 447 U.S. 490, 504 (1980). A collective-bargaining provision which is essentially intended to protect bargaining unit jobs is of vital interest to the unit employees; the subject matter of such a provision is a mandatory bargaining subject. Teamsters Union v. Oliver, 358 U.S. 283, 294-295 (1959). See also, e.g., National Woodwork Mfrs. v. NLRB, 386 U.S. 612, 642 (1967); Davol, Inc., 237 NLRB 431, 434 (1978), enfd.

⁵ As explained below, a BRAC determination of base closure, with presidential approval, initiates a lengthy transition process rather than an automatic shutdown of the base.

597 F.2d 782 (1st Cir. 1979). We find that the CA, a job-protection agreement, was the product of collective bargaining on a mandatory subject.⁶

The primary question before us is whether the Respondent violated the Act by its early termination of the CA. This is, in part, a contractual issue; it is not, however, the sole issue of unlawfulness raised in the complaint allegations.

Before resolving the contract question, we find as a preliminary matter that the judge's application of *NCR Corp.*, supra, was erroneous in the circumstances of this case. In *NCR*, the Board, faced with both an allegation that the employer had unlawfully transferred bargaining unit work at midterm of the collective-bargaining agreement and with competing interpretations of the same contract language, stated:

The Board is not compelled to endorse either of these two equally plausible interpretations of the contract's operation in this case. The present dispute is solely one of contract interpretation. As the Board has stated in *Vickers, Inc.*, 153 NLRB 561, 570 (1965), when "an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it," the Board will not enter the dispute to serve the function of [an] arbitrator in determining which party's interpretation is correct.

271 NLRB at 1213 (fin. citations omitted). The Board also noted that even if the General Counsel's and the union's contract interpretation were controlling, the matter was "a mere breach of the contract" not necessarily establishing an unfair labor practice. Id. at fin. 6. The Board dismissed the complaint. In *Vickers, Inc.*, supra, the judge, with Board approval, dismissed a complaint alleging unlawful unilateral changes where the parties had raised competing contractual interpretations. The judge applied the "sound arguable basis" standard above, noting that it was only a breach-of-contract case involving a matter of contract interpretation. 153 NLRB at 570. He also noted that there was no evidence that the respondent sought to undermine the union or to evade its collective-bargaining obligations by its conduct. Id. at 571.

Consistent with these decisions, the Board has applied the "sound arguable basis" standard in cases where solely "a contract dispute" was presented, see, e.g., *Thermo Electron Corp.*, 287 NLRB 820 (1987), and has refrained from its application where the circumstances involved more than a mere matter of contract interpretation, see, e.g., *Trojan Yacht*, 319 NLRB 741 fn. 5 (1995;, *Flatbush Manor Care Center*, 315 NLRB 15 fn. 1 (1994); see also *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975) (employer's midterm unilateral change in the collective-bargaining agreement's wage provisions was "not just a mere breach of contract" but a "basic repudiation of the bargaining relationship").

Application of the "sound arguable basis" standard is not appropriate in the instant case. The Respondent is alleged to have repudiated the CA in its entirety, not simply breached one of its provisions. The cancellation of the CA opened the door to the Respondent's decision to shut down the engine operation at the Stratford plant and relocate it to Phoenix, over half a continent away, and is a basis for the Respondent's claim that it was free to make the relocation decision without bargaining with the Union. Thus, the issue of whether the Respondent could lawfully cancel the CA is more than a mere contract dispute. It is situated at the threshold of matters going to the heart of the collective-bargaining relationship and to the Respondent's duty to bargain in accordance with the Act.⁷

Thus, while the Respondent's termination of the CA does present a contractual issue, it is clear that we are empowered to decide it in the course of determining whether the Respondent violated Section 8(a)(5) and (d) of the Act by its actions. *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 428–429 (1967). We find, on the basis of undisputed evidence, that the Respondent was not privileged to terminate the CA when it did because it had not satisfied certain provisions of section 6 of that agreement which were a prerequisite to early termination. The parties do *not* dispute that section 6 expressly required the Respondent to take certain steps before it was permissible to cancel the agreement short of its term. Thus, the Respondent was required:

to make application to appropriate officials of the United States Government for financial arrangements in an amount considered by AlliedSignal to be adequate. . . .

AlliedSignal will share cost data and other backup information with the Union at least sufficient to

⁶ The standard for evaluation of mandatory bargaining subjects set out in *Dubuque Packing Co.*, 303 NLRB 386 (1991), enfd. sub nom. *Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), cert. dismissed 511 U.S. 1138 (1994), is inapposite in the instant situation. The *Dubuque* test, like the Supreme Court precedent it relies on, focuses on a discrete decision affecting bargaining unit work. 303 NLRB at 391; see also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). Here, we do not evaluate whether the Respondent's decision to relocate to Phoenix was a mandatory bargaining subject. Rather, we analyze the mandatory nature of the CA, an agreement the Respondent from consideration of such a decision during its term. See also *Otis Elevator Co.*, 269 NLRB 891 fn. 16 (1984) (Member Dennis concurring).

⁷ Our dissenting colleague would apply the *NCR* standard because the Respondent held a "good-faith position" on a contract-breach question. In taking this view, he ignores the context of the Respondent's conduct, as set forth above—a setting that implicated core issues in the collective-bargaining relationship.

provide an understanding of the calculation of the amount sought from the Government.

After AlliedSignal makes such an application to the Government, if no provision to fund such financial arrangements in the amount sought by AlliedSignal shall be made in the federal budget as next thereafter enacted, then . . . AlliedSignal may terminate this Competitiveness Agreement.

Assuming that the Respondent is correct that section 6 establishes a recurrent, *annual* funding need to be satisfied by Federal appropriations, the Respondent was required to carry out the "application" and "sharing information" obligations above in 1995 for fiscal 1996 funding. The record establishes sufficiently that the Respondent satisfied neither prerequisite.

Both requirements indicate that it was incumbent on the Respondent to identify a financial "amount" it considered adequate to seek from the Federal Government. No such amount has been identified in this record. The "\$30 million annual shortfall" figure that the Respondent presented to the Union after the BRAC closure determination does not fulfill this requirement. Michael Meshay, the Stratford plant's site manager, was responsible for this and other financial calculations involving the plant in 1995. He testified that the \$30 million figure was *not* related to any potential cutoff of Federal funding. He stated that a loss of annual Federal funding would be *additional* to the \$30 million shortfall the Respondent had identified.

More significantly, and apart from any failure to identify an "amount" and share information about it with the Union, the Respondent never "made application" pursuant to the terms of the CA with any agency, representative, or official of the Federal Government for fiscal 1996 funding. This was admitted on the record by James Robinson, in 1995 the president of AlliedSignal Engines, the division in the Respondent's corporate structure responsible for the Stratford plant.

In reply to the Union's exceptions raising this issue, the Respondent suggests that it was excused from the application requirement because it would have been an exercise in futility. The Respondent's view is that, in light of the DOD's refusal until April 1995 to release the \$47.5 million already appropriated and the BRAC base closure decision in June, the circumstances were clear that the DOD would not support any future Federal funding for the Stratford plant. However, it does not appear that the situation was so devoid of expectation that the Respondent could preemptively excuse itself from its contractual obligations.

The Respondent was aware in 1995 that the DOD's recent relationship with the Stratford plant was one of inconsistent funding signals. Thus, the Respondent knew that in the previous 2 years the DOD had withheld from Textron \$17 million that Congress had appropriated for

the SAEP for fiscal year 1994. Nevertheless, and despite the DOD's obstinacy, these funds were subsequently redesignated for the SAEP in Congress' fiscal 1995 appropriations. Further, in early 1994, the Defense Science Board, an agency operating within the DOD, recommended that the AGT-1500 program at the Stratford plant be supported long term on a standby basis, with at least \$20 million per year in funding. In fact, this affirmative, long-term funding recommendation was significant in the Respondent's decision to purchase the Stratford engine operation. In February 1995, about a year later, the DOD's view of the SAEP reversed 180 degrees. The Secretary of Defense recommended to the BRAC commission that the SAEP's closure as a military base be initiated; this included its AGT-1500 productionand-maintenance standby capacity. After this recommendation, and while the BRAC commission evaluated the matter, the DOD refused to release the \$47.5 million that Congress had appropriated for the SAEP in the 1995 fiscal year budget. Then, due at least in part to lobbying by the Respondent and the Union, the DOD again aboutfaced, releasing the \$47.5 million in spring 1995. In summary, the Respondent had witnessed firsthand the DOD's several turnabouts in the recent past concerning the funding of the Stratford plant. There is no evidence, before or after the President's final base closure determination, that the DOD, or any other Federal Government entity, provided an unequivocal message to the Respondent that Federal funding for the plant for fiscal year 1996 was not a possibility.

As a related matter, one indicating that the Respondent could reasonably expect continued DOD funding, the closure of the SAEP as a military base was subject to a 6-year process. It was not immediate upon the President's final approval in July 1995. The Respondent accordingly could not reasonably assume at that time that Federal funding for the base would be terminated automatically and immediately. In fact, despite the Respondent's assertion that it was futile to apply for fiscal year 1996 funding, Meshay's testimony establishes that Congress did appropriate some funds for the AGT-1500 maintenance program at Stratford for that fiscal year.

In addition, the initiation of the closure process was scheduled to begin as late as mid-July 1997. This would be *after* the CA's June 6, 1997 expiration date, suggesting that the CA's purpose—a joint effort to protect jobs by enhancing the plant's commercial production capability—could be pursued in the face of the BRAC closure decision. Moreover, the 6-year closing process includes a program for transition of the military base to civilian use, which was, in essence, the primary strategy underlying the terms of the CA. The BRAC program, which apparently is designed to mitigate the negative economic impact of the closure in the immediate geographic area, is fully consistent with the goals of the CA as a transitional document.

In view of the circumstances above, the Respondent has provided no acceptable justification for dispensing with the section 6 requirement that it apply for funding for fiscal year 1996. Because the Respondent clearly failed to satisfy the prerequisites set out in section 6, its termination of the CA in September 1995 constituted an improper unilateral repudiation of the parties' agreement.⁸

As we determined above, the CA's job-preservation purpose marks it as a matter for mandatory bargaining under the Act. Accordingly, we conclude that the Respondent's premature unilateral termination of the CA violated Section 8(d) and (a)(5), and we will order an appropriate remedy for this violation. We find it unnecessary to reach the two other 8(a)(5) allegations addressed by the judge. Both are based on the Respondent's decision to relocate the Stratford plant. Independent unfair labor practice issues related to this decision could arise only in the context of a legitimate cancellation of the CA, which precluded such decisions during its term. Because the Respondent's termination of the CA was unlawful, there was no legitimate basis for the Respondent to even address such a decision. Thus, any injury to unit employees resulting from the relocation decision is properly treated in the remedy for the Respondent's unlawful repudiation of the CA.

AMENDED REMEDY

The standard remedy for the Respondent's unfair labor practice is restoration of the status quo ante by reinstatement of the terms of the CA, with directions to make the bargaining unit employees whole for any relevant losses they may have suffered as a result of the Respondent's misconduct, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall so order

In the remedy section of his decision, the judge discussed at length the remedial ramifications of his conclusion that the Respondent unlawfully refused to bargain about its decision to relocate the Stratford plant. Although the violation we have found is different, its remedial implications are quite similar, and accordingly, we affirm the judge's discussion concerning the transfer of bargaining unit work and equipment, and concerning layoffs of unit employees, both of which may have been consequences of the Respondent's repudiation of the CA. In addition, we affirm his rejection of the Union's request that the Respondent be ordered to dismantle any duplicate engine-manufacturing capacity in Phoenix, and

his rejection of the Union's request for an award of costs and fees.

We agree with the General Counsel's and the Union's exception that any unit work which may have been subcontracted as a result of the Respondent's unlawful conduct should be addressed in the Order. Accordingly, we will add appropriate language to the Order restoring any such work to the Stratford plant and making whole any unit employees who may have been affected thereby. See, e.g., *Power, Inc.*, 311 NLRB 599, 600 (1993), enfd. 40 F.3d 409 (D.C. Cir. 1994).

The General Counsel has joined the Union in excepting to the judge's rejection of the request for an extension of the duration of the CA by approximately 20 months to remedy the Respondent's unlawful, premature termination of the agreement. We agree with the judge, however, and we note that such an extraordinary remedy would constitute an impermissible change in the substantive terms of the CA. See Operating Engineers Local 30 (Hyatt Management), 280 NLRB 205 (1986), petition for review denied 817 F.2d 140 (D.C. Cir. 1987); Raven Industries, 209 NLRB 335 fn. 2 (1974), affd. in relevant part 508 F.2d 1289 (8th Cir. 1974). As indicated above, we will order the standard remedy for the Respondent's violation, which includes reinstatement of the CA through its June 6, 1997 expiration date, and continuation of its terms thereafter until the Respondent negotiates a new agreement in good faith with the Union or the parties reach impasse. See, e.g., Air Vac Industries, 282 NLRB 703 (1987): Auto Fast Freight, 272 NLRB 561. 564 (1984), enfd. 793 F.2d 1126 (9th Cir. 1986).

ORDER

The National Labor Relations Board orders that the Respondent, AlliedSignal Aerospace, a Division of Allied Signal, Inc., Stratford, Connecticut, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Locals 1010 and 376, by repudiating the competitiveness agreement at mid-term.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Reinstate all terms and conditions of employment provided under the competitiveness agreement, whose duration was from May 30, 1994, until June 6, 1997, and maintain them until such time as the parties have bargained in good faith and have either reached a new agreement or a lawful impasse.
- (b) In the event that bargaining unit work has been transferred or subcontracted, or equipment necessary for

⁸ Our dissenting colleague finds that a fiscal-1996 funding application would have been futile—that future funding was "simply not in the cards." However, as set forth above, there is *no* evidence that the Respondent received a clear signal from any appropriate entity that an application for 1996 funding would be a waste of time. And the relevant circumstances indicate that a request for further funding, at least through the remainder of the CA's term, would have been consistent with the transitional objectives of both the CA and the BRAC program.

such bargaining unit work has been transferred or relocated, to the Respondent's Phoenix, Arizona facility or to other locations, as a consequence of the Respondent's premature termination of the competitiveness agreement, return such work and/or such equipment to the Respondent's Stratford, Connecticut facility.

- (c) In the event that bargaining unit employees have been laid off as a consequence of the Respondent's premature termination of the competitiveness agreement, offer those employees immediate and full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.
- (d) In the event that bargaining unit employees have suffered any loss of earnings or other benefits as a consequence of the Respondent's premature termination of the competitiveness agreement, make those employees whole for such losses, in the manner set forth in the amended remedy section of this decision.
- (e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (f) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 29, 1995.
- (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting.

I do not agree that Respondent breached section 6 of the competitiveness agreement (CA). Further, even if it did, that breach was not a violation of Section 8(d)-8(a)(5).

There is a significant distinction between a contract breach and an 8(d) "termination or modification." In cases where the employer has a reasonable position concerning a contractual issue, the Board will dismiss an 8(d)-8(a)(5) complaint. For, in such cases, even if it turns out that the employer was wrong, the employer has simply breached the contract. By contrast, in cases where the employer ignores the contract, i.e., fails to follow its clear provisions, the employer has violated Section 8(d) by terminating or modifying the contract (depending on whether he has abrogated all or part of the contract).

The instant case involves a contract dispute in which both parties have reasonable positions on the contract issue. Indeed, my colleagues do not even assert that Respondent's position was unreasonable. Instead, they say that *NCR* does not apply in circumstances where the whole contract is in issue, rather than simply one of its terms.

I disagree on this point. I note initially that only one provision is in dispute here, i.e., section 6 of the CA. More importantly, the distinction between a contract breach and an 8(d) violation is *not* whether all or part of the contract is in dispute. As discussed above, the distinction is between cases where there is a bona fide issue of contract interpretation and cases where there is not such an issue.

My colleagues' position is directly contrary to the statute. That is, Section 8(d) speaks of "termination and modification." Thus, if the employer terminates the whole contract or only modifies one of its terms, without a reasonable position, such conduct is unlawful under Section 8(d). Similarly, if the employer has a good-faith position on the contractual issue, such conduct is at most a contract breach, irrespective of whether the case involves a single clause or the entire contract.

As I show below, Respondent here did not breach the contract. However, even if Respondent did so, its position was reasonable. (Again, my colleagues do not argue the contrary.) Thus, Respondent did not violate Section 8(d) of the Act.

As to the first point, my colleagues assert that Respondent failed to honor section 6 of the CA. That section provided that Respondent was obligated:

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ See NCR Corp., 271 NLRB 1212 (1984); Thermo Electron Corp., 287 NLRB 820 (1988).

to make application to appropriate officials of the United States Government for financial arrangements in an amount considered by AlliedSignal to be adequate to support the future of the Stratford plant by AlliedSignal

My colleagues assert that Respondent failed to carry out this obligation with respect to funding for fiscal year 1996, i.e., October 1, 1995, to September 30, 1996. Respondent defends by saying that it would have been futile to "make application" because it was clear that such an effort would have been futile. In this regard, Respondent notes that the Department of Defense (DOD) recommended in February 1995 that the facility involved herein be closed. The recommendation was sent for approval to the Defense Base Closure and Realignment Commission (BRAC Commission) and then to the President. In light of this, DOD would not even release the \$47.5 million appropriated for this facility for fiscal year 1995.² In late June, BRAC concurred in the DOD recommendation to close, and the President approved it on July 13.

In these circumstances, it would have been futile to seek the necessary funding. That is, it was simply not in the cards that Congress would appropriate funds "to support the future of the Stratford plant," in circumstances where it was clear that the Stratford plant was going to close.

My colleagues assert that an effort would not have been futile. In this regard, they rely on: (1) the release of funding for fiscal years 1994 and 1995; (2) a recommendation by the Defense Science Board to support long-term funding for the Stratford plant; (3) the fact that the plant closing did not have to be completed until 2001.

With respect to (1) above, I note that it is one thing to release *appropriated funds* for a plant. It is quite another *to secure an appropriation* for a plant that is destined to close. With respect to (2) above, suffice it to say that the recommendation was effectively overruled by the Secretary of Defense, BRAC, and the President himself in July 1995. With respect to (3) above, the issue here is not when the plant would actually close, but rather the likelihood of obtaining full funding for a plant that is destined to close.

Thus, it is clear that it would have been futile to seek funding "for the future of the Stratford plant" that was destined to close. Further, even if the Board now concludes that it was not futile, there is at least a reasonable argument that it was futile. Phrased differently, Respondent is not unreasonable in arguing that such efforts would have been futile.

In light of the above, I conclude that Respondent did not breach the contract. And, even if it did, that breach was not a violation of Section 8(d)–8(a)(5).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Locals 1010 and 376, by repudiating the competitiveness agreement at midterm.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reinstate all terms and conditions of employment provided under the competitiveness agreement, whose duration was from May 30, 1994, until June 6, 1997, and WE WILL maintain them while we bargain in good faith with the Unions until we reach either a new agreement or a lawful impasse.

WE WILL, in the event that bargaining unit work has been transferred or subcontracted, or equipment necessary for such bargaining unit work has been transferred or relocated, to our Phoenix, Arizona facility or to other locations, as a consequence of our premature termination of the competitiveness agreement, return such work and/or such equipment to our Stratford, Connecticut facility.

WE WILL, in the event that bargaining unit employees have been laid off as a consequence of our premature termination of the competitiveness agreement, offer those employees immediate and full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL, in the event that bargaining unit employees have suffered any loss of earnings or other benefits as a consequence of our premature termination of the competitiveness agreement, make those employees whole for such losses, with interest.

ALLIEDSIGNAL AEROSPACE, A DIVISION OF ALLIED SIGNAL, INC.

² The funds were ultimately released in mid-April 1995.

Thomas E. Quigley, Esq., for the General Counsel.

Richard C. Hotvedt, Esq. (Morgan, Lewis & Bockius) and Patrick W. McGovern, Esq., for the Respondent.

Thomas W. Meiklejohn, Esq. (Livingston, Adler, Pulda & Meiklejohn), for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me during 16 days of hearing commencing September 18, 1996, and concluding on December 19, 1996. Upon charges filed on October 12 and November 20, 1995, a consolidated complaint was issued on July 3, 1996, alleging that AlliedSignal Aerospace, a Division of Allied Signal, Inc. (Respondent or Allied) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices. I

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on February 12, 1997.²

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, with its corporate office and principal place of business located in Morristown, New Jersey, and a production facility located in Stratford, Connecticut, has been engaged in the manufacture and sale of engines and related products. Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and Local 1010 (the Union or Local 1010) are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The issues in this proceeding are (1) whether Respondent unlawfully terminated the competitiveness agreement; (2) whether Respondent was required to engage in decision bargaining with respect to its decision to close the Stratford facility and relocate unit work; and (3) whether Respondent unlawfully failed to provide certain information to the Union concerning its decision to relocate unit work.

B. The Facts

1. Background

In late 1993, Respondent began to actively consider purchasing the business of Textron Lycoming Division of Textron, Inc. (Textron) located in Stratford, Connecticut. The Stratford facil-

ity is commonly known in the defense industry as the Stratford Army Engine Plant or (SAEP). For many years the plant's primary product was the production of helicopter and other engines for the Armed Services and since the late 1970s production of the AGT 1500, a gas turbine engine for U.S. Army tanks

2. 1994 negotiations for a collective-bargaining agreement

Local 1010 represents a unit of production and maintenance employees at SAEP while Local 376³ presents a much smaller unit of technical and clerical support staff employees. Historically, bargaining with Local 1010 occurred first, followed by bargaining with Local 376 over issues unique to that unit. The labor agreements between Textron and the Union were to expire on May 30, 1994. One of the conditions of the sale of Textron to Allied was that labor agreements acceptable to Allied be reached between Textron and the Union. On May 12, 1994, Allied and Textron announced that Allied would purchase the Textron Lycoming Turbine Engine Division.

On June 9, 1994, an internal Allied memorandum circulated in the plant which stated that the "best assumption today is that the Army will not buy any new tank engines. We need to evaluate the barriers to closing the plant in case that it eventually becomes expedient." On learning of this memorandum, the union representatives became concerned that once the acquisition took place Allied would close the plant and relocate to its headquarters in Phoenix, Arizona. Accordingly, negotiations virtually ground to a halt. Philip A. Wheeler, the Union's regional director, spoke to Edward J. Bocik, Allied's vice president of labor relations, and told Bocik that the Union was seeking a long-term commitment from Allied to remain in Stratford. Bocik replied that it was essential to obtain "military funding." It was agreed that a meeting would be scheduled with representatives of Local 1010, Local 376, Textron, and Allied.

3. Status of Federal funding as of June 1994 and June 27 meeting

In the 1994 Federal budget, which had been passed in October 1993, Congress appropriated \$17 million for the tank engine base but as of mid-1994 the funds had not actually been released by the Army to Textron. On March 14, 1994, the "Blue Ribbon Panel" of the Defense Science Board recommended that the Army release the \$17 million to SAEP.

Bocik arranged for a meeting to be held on June 27 at Wheeler's office. Bocik and Donald Shaw, Allied vice president of human resources, attended for Respondent, while Textron's chief negotiators, George Metzger and Frank McNally attended for Textron. The Union was represented by Wheeler, his assistant Robert Madore, Joseph Ciuci, then-president of Local 1010, and Russell See, president of Local 376.

Bocik presented a draft "competitiveness agreement" (CA), which Bocik stated, "[D]escribes the context in which Allied-Signal can commit to keep certain work in the plant." Bocik also stated that "Textron and AlliedSignal are most interested in reaching agreements with Local 1010 and Local 376 that will address the concerns of the Union membership and support the future of the Stratford plant." Bocik read aloud each of the six

¹ In its answer Respondent stated as an affirmative defense that the matter should be deferred to arbitration. This request was withdrawn on December 16, 1996.

² G.C. Exh. 114 is admitted into evidence.

³ On September 18, 1996, the General Counsel moved to amend the complaint to include allegations concerning Local 376 similar to those involving Local 1010. I granted the motion.

provisions of the CA at the meeting. Section 6 of the draft CA proposed as follows:

Should AlliedSignal purchase TLTED's assets, AlliedSignal intends to make application to appropriate officials of the United States Government for financial arrangements in an amount considered by AlliedSignal to be adequate to support the future of the Stratford plant by AlliedSignal on a stand-by basis for the production of the AGT-1500 engine, if active procurement of that engine should cease

After AlliedSignal makes such an application to the Government, if no provision to fund such financial arrangements in the amount sought by AlliedSignal shall be made in the Federal budget as next thereafter enacted by the Congress of the United States, then at any time after such enactment of a Federal budget, AlliedSignal may terminate this Competitiveness Agreement.

Bocik testified, that when going through the language of section 6, he explained to the union representatives that "this meant we needed funding in each year. And if we didn't get what we needed in each year, we had to maintain the right to cancel the competitiveness agreement." Wheeler recalled, however, that Bocik specifically referred to the amount that had already been submitted by Textron in the 1995 Federal budget as the Federal funding being sought by Respondent, and that Bocik stated that Respondent needed this money to "get over the hump." Bocik denied that he used the phrase "get over the hump." The draft of Bocik's prepared text states "for Allied-Signal to competitively manufacture the remaining engines that are now being produced in Stratford, it must obtain financial U.S. from the Government."

On July 7 the Union submitted a counterproposal to the June 27 draft of the CA, which proposed to insert the language in section 6 "to fund such financial arrangements in the amount *reasonably required.*" The Union's proposal was not accepted, and on July 15, 1994, the parties entered into the competitiveness agreement. On July 19 new 3-year collective-bargaining agreements expiring June 6, 1997, were reached, and made retroactive to May 30, 1994. Also, on July 19 Allied signed a "memorandum of agreement" in which it agreed to assume the contractual obligations of Textron, including the collective-bargaining agreement, the competitiveness agreement, and the effects bargaining agreement. A similar agreement with respect to Local 376 was reached on July 22, 1994.

4. 1994 Federal appropriations

On July 13, 1994, Allied sent letters to various members of Congress urging release of the \$17 million previously appropriated but not released, and urging approval of the Blue Ribbon Panel's recommendation. The total amount requested by Allied in July 1994 was \$52 million (\$35 million plus \$17 million left over from the 1994 Federal budget). On September 26, 1994, Congress appropriated \$47.5 million. This included the \$17 million previously appropriated but not released.

5. Placement on the BRAC list

On February 28, 1995, Secretary of Defense William Perry announced the Department of Defense's recommendations to close or realign 146 military installations in the United States.

The recommendations were being forwarded to the Base Closure and Realignment Commission (BRAC). SAEP was on the list. News of the plant's inclusion on the base closing list took Allied and union representatives by surprise. James Robinson, then Allied's vice president and general manager, testified that when the BRAC closure list came "zinging out of the blue" it was "like getting kicked in the stomach . . . that was the date when the world changed."

Once SAEP appeared on the BRAC list a split developed within the Armed Services as to whether the \$47.5 million were still required. Allied began lobbying the Defense Department and members of Congress for release of the withheld funds. The Union joined in the effort and lobbied the Connecticut delegation, meeting with Senators Dodd and Lieberman and Congresswoman Rosa DeLauro. On March 3 David Coventry, Allied's AGT 1500 program manager, wrote to Prince Young Jr. of the U.S. Army's tank automotive command (TACOM) that "without Army support, AE (AlliedSignal Engines) will discontinue their downsizing efforts and make arrangements to move commercial production to Phoenix . . . AE views the release of the \$47.5 million industrial base funds as a requirement to keep commercial business at SAEP." On April 13 Robert Choulet, president of AlliedSignal Engines, a Division of AlliedSignal Aerospace, wrote to the then Deputy Secretary of Defense, John Deutch, and expressed his concern over the delay in the obligation of the funds for the tank engine base. The letter stated that, "without the release of these funds . . . AlliedSignal will have no alternative but to begin moving our commercial business out of Stratford." On April 14 the Secretary of Defense approved release to the Army of the \$47.5 million tank engine industrial base funds.

6. Subsequent events

On June 23 the BRAC Commission rejected the arguments in favor of removing the plant from the list and sent its report to President Clinton and on July 13 the President accepted the BRAC Commission's recommendations. On June 26 there was an employee meeting in the plant attended by Congresswoman DeLauro, Michael Meshay, site manager, and Local 1010 president, David Kelly. Meshay announced to the work force that Allied would immediately be putting in place "an implementation team . . . that will be reviewing with the Army what they want to do with the facility." Kelly stated, "I'm not sure that this is the end of the line. It does appear to be. We don't know when the final closing will occur . . . I'm going to contact Larry Bossidy, CEO of Allied Signal Corporation, to see whether or not they would be willing to sit down with us and see if there's some kind of option to keep the manufacturing here in the State of Connecticut." On June 28 Kelly and Meshay met, at which time Meshay presented a plan showing how Allied could save \$30 million by consolidating operations in Phoenix. Kelly told Meshay "if you move any of the bargaining unit work out of the Stratford plant we'll consider that to be a violation of our agreement."

On July 14 Meshay sent a letter to plant employees stating that "it does not appear that an economic case can be made to remain in Stratford without the ownership and support of the Army [and] it is difficult to foresee a way that AlliedSignal can economically operate the facility, even if incentives were offered by the U.S. Government, Connecticut or Stratford authorities." The letter continued:

⁴ All subsequent dates refer to 1995 unless otherwise specified.

Ultimately, the BRAC decision requires AlliedSignal to embark upon further evaluation of options for continued delivery of ongoing production and engineering contracts that the Stratford facility is obligated to fulfill. These options include transitioning Stratford operations to another AlliedSignal facility, most likely the Engines facility in Phoenix.

On the same day Kelly sent a letter to Meshay, stating:

Local 1010 and the International Union consider your letter to all employees on July 14, 1995 concerning the transfer of production operations to Phoenix, AZ to be in violation of our Labor Agreement, the Competitiveness Agreement and the National Labor Relations Act.... If it is AlliedSignal's intention to move any bargaining unit work we demand to bargain over the decision and effects of such action.

7. Request for information

On July 31 Kelly wrote to Meshay requesting certain information. The letter stated, "This information is essential to the Union in order for us to bargain informatively over the 'decision' and 'effects' created by your desire to relocate production lines, engine assembly, engine testing and equipment and machinery." By letter dated August 16, Brian McMenamin, Allied's director of human resources, stated, "As of this writing, AlliedSignal still has not made a decision to close the facility. Until such time as a decision to close is made, AlliedSignal will defer replying to your letter."

8. Termination of the competitiveness agreement

On September 29 Meshay wrote to Kelly:

I regret to inform you that pursuant to Section 6 of the 1994 Competitiveness Agreement AlliedSignal is exercising its right to terminate the Competitiveness Agreement. Pursuant to Section 6, this letter is AlliedSignal's 90-day notice of termination which shall take effect upon the enactment of the 1996 Federal budget or 90 days from the date of this letter, whichever is later. Pursuant to Section 4 of the Agreement, AlliedSignal is prepared to commence impact bargaining.

On October 3 Kelly sent the following reply to Meshay:

The Company's right to terminate the Competitiveness Agreement is limited to specific financial circumstances. Inasmuch as the Army awarded AlliedSignal \$47.5 million for preservation of the tank engine industrial base at Stratford, there are no grounds to terminate the Competitiveness Agreement.

Subsequently, the parties met but Allied insisted that it would meet to discuss effects bargaining only and that the decision to relocate did not turn on labor costs. Until mid-August 1996 Allied maintained its position that the decision to relocate was not a mandatory subject of bargaining and thus it would not provide information to the Union about the decision. However, shortly before the hearing began, Allied provided the Union with a majority of the information it had been requesting since July 31.

C. Discussion and Conclusions

1. Termination of competitiveness agreement

Section 6 of the competitiveness agreement, which was executed on July 15, 1994, states, in pertinent part:

Should AlliedSignal purchase TLTED's assets, AlliedSignal intends to make application to appropriate officials of the United States Government for financial arrangements in an amount considered by AlliedSignal to be adequate to support the future of the Stratford plant by AlliedSignal on a stand-by basis for the production of the AGT 1500 engine, if active procurement of that engine should cease

After AlliedSignal makes such an application to the Government, if no provision to fund such financial arrangements in the amount sought by AlliedSignal shall be made in the Federal budget as next thereafter enacted by the Congress of the United States, then at any time after such next enactment of a federal budget, AlliedSignal may terminate this Competitiveness Agreement.

Respondent contends that it was the intention of this section that if in any year adequate financial arrangements were not provided in the Federal budget, Allied was permitted to terminate the CA. In this vein, Bocik, one of the drafters of the competitiveness agreement, testified that at the June 27 meeting "I explicitly stated to Mr. Wheeler and the other union people in that meeting, that this meant we needed funding in each year. And that if we didn't get what we needed in each year, we had to maintain the right to cancel the competitiveness agreement." Similarly, Shaw testified that Bocik "made it very clear that there had to be Federal funding that was at a level satisfactory to AlliedSignal year-by-year." On the other hand, Fabrizio testified that at the June 28 meeting Bocik stated that Allied "needed Government funding to keep Stratford going." When asked whether Bocik specified what Federal funding was needed, Fabrizio testified, "he just used the term we need funding." Fabrizio further testified that there was no discussion at this meeting of funding being required for "future use." Russell See testified that at the June 27 meeting Bocik stated that it was necessary to "get over the hump." See explained that the "hump" was the money currently being requested by Textron in the current Federal budget. Bocik denied that he made any such statement. Kelly initially testified that at the June 28 meeting both Bocik and Metzger stated that the "competitiveness agreement will stay in full force and effect unless Congress does not approve the \$47-1/2 million funding." He subsequently retracted this testimony.

I do not credit the testimony that Bocik specifically stated that Respondent required year-to-year funding. Nor do I credit the testimony that Bocik stated a specific amount that was necessary to "get over the hump." Instead, I believe that the matter was left vague. Just as in the competitiveness agreement there is no mention of continual year-to-year funding, I believe that in the negotiations leading up to the signing of the competitiveness agreement the amount of Federal funding was not specified. In this regard Respondent's Exhibit 23, which is the draft of Bocik's statement at the June 27 meeting, states, "for AlliedSignal to competitively manufacture the remaining engines that are now being produced in Stratford, it must obtain financial assistance from the Government." There is no mention of continual or year-to-year funding. Similarly, Shaw's notes of the June 28 meeting concerning the competitiveness agreement state that Bocik read the "list of engines which will continue to be manufactured in Stratford if sufficient Government funding is provided." Again, the notes do not specify year-to-year or continual funding. I believe that there was no

specificity with respect to funding because it was the intent of Allied to continue at the Stratford location at least until the expiration of the collective-bargaining agreement. In May 1994 the Blue Ribbon Panel had recommended continued funding for SAEP. It was not until the initial BRAC list was published on February 28, 1995, that the parties realized that there may be no more Federal funding. As Robinson credibly testified when the BRAC closure list came "zinging out of the blue," it was like "getting kicked in the stomach . . . that was the date when the world changed." Accordingly, I find that the statements made during the negotiations concerning the meaning of what Federal funding was required are not helpful. Therefore, I must look to the text of the competitiveness agreement to determine what I believe is its proper interpretation.

In NCR Corp., 271 NLRB 1212, 1213 (1984), the Board stated:

The Board is not compelled to endorse either of these two equally plausible interpretations of the contract's operation in this case. The present dispute is solely one of contract interpretation. As the Board has stated in *Vickers, Inc.*, 153 NLRB 561, 570 (1965), when "an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it," the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct. [Footnote omitted.]

I believe that both the Union's and Respondent's interpretations are reasonable. The Union's interpretation is that the funding relates to the requests made by Allied in the spring and summer of 1994 and the eventual authorization in "the Federal budget as next thereafter enacted" of \$47.5 million. On the other hand, Allied's interpretation of section 6 is also reasonable. It points out that section 6 states that at any time after such next enactment of "a" Federal budget, which would indicate that section 6 is not referring to one specific year's Federal budget. The reasonableness of Respondent's interpretation is buttressed by a memorandum dated June 24, 1994, which states, "each year after FY 95, they will have to 'lock arms' with management to insure the \$15M in spares and \$20M of overhaul work gets authorized and appropriated in case the Army does not include it in their budget." Indeed, as pointed out earlier, at the employee meeting of June 26 after the BRAC report was approved, Kelly stated, "I'm not sure that this is the end of the line. It does appear to be. We don't know when the final closing will occur." Accordingly, I find that Respondent had a "sound arguable basis" for ascribing its meaning to the competitiveness agreement and that its termination of the CA was in accordance with the terms of the agreement as it construed it. See NCR Corp., supra at 1213; Yellow Freight Systems, 313 NLRB 309, 331 (1993), enfd. in part 37 F.3d 128 (3d Cir. 1994). Therefore, I conclude that Respondent's termination of the competitiveness agreement on September 29, 1995, was not in violation of the Act. Accordingly, the allegation is dismissed.

2. Decision bargaining

(a) Waiver

In its counterproposal of July 7, 1994, of the competitiveness agreement the Union proposed in section 4 that the provision

state "the Union retains the right to engage in collective bargaining with AlliedSignal with respect to the decision and effects upon bargaining unit employees should AlliedSignal decide in the future to close the Stratford plant." The right to engage in "decision" bargaining was rejected and the final version of the CA states that "the Union retains the right to engage in collective bargaining with AlliedSignal with respect to the effects upon bargaining unit employees should AlliedSignal decide in the future to close the Stratford plant." Respondent appears to argue that by virtue of the fact that decision bargaining was not included in the final version of the competitiveness agreement, the Union waived its right to such bargaining.

The Board will not find a waiver of the right to bargain over a mandatory subject unless the waiver is "clear and unmistakable." *Metropolitan Edison Co.* v. NLRB, 460 U.S. 693, 708 (1983); *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995); *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989). The fact that section 4 specifically preserves the right to engage in effects bargaining is not an explicit waiver of the right to engage in decision bargaining. The failure to win explicit recognition of a right is insufficient to establish a waiver. As the Board stated in *Johnson-Bateman Co.*, supra 295 NLRB at 185:

Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter. [Footnote omitted.]

Kelly testified that when discussing the "decision and effects" language of the Union's counterproposal to section 4 of the CA, Metzger said, "it's not necessary. This is redundant. The whole section 4 is a commitment to engage in decision bargaining. I checked it out and I agreed with that, and we dropped our proposal. It wasn't necessary." While McNally denied that Metzger made such a statement, it appears that at least in Kelly's thinking the right to decision bargaining was not being waived. Based on the previously cited cases, I find that the Union did not "clearly and unmistakably" waive its right to decision bargaining.

(b) Dubuque Packing Co.

In *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. sub nom. *Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), cert. dismissed 114 S.Ct. 2157 (1994), the Board announced the test to be applied in cases involving decisions to relocate bargaining unit work:

Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and the direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponder-

ance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

The first step in the Dubuque analysis is to determine whether Respondent's decision involves the relocation of bargaining unit work. There does not seem to be any serious dispute that this case involves such a relocation. When Meshay first informed the Stratford employees that Allied was contemplating closing the plant, he wrote that Respondent was evaluating the option of "transitioning Stratford operations to another AlliedSignal facility, most likely the Engines facility in Phoenix." In Respondent's news release of September 29, 1995, it stated "AlliedSignal Aerospace announced today that it will vacate the Stratford plant by mid-1997. The company is planning to move production to other AlliedSignal facilities, with its Phoenix operations being its first choice." When testifying concerning the \$30 million savings of moving to Phoenix, Robinson stated that, "we got the recommendation that the numbers that were produced would yield a decision that we should close the business and move it." The explanation of the decision supplied by Meshay to Local 1010 in February 1996 focuses on the savings to be achieved by transferring the work to Phoenix and states "no new facilities to be constructed in Phoenix to absorb SAEP." Thus, I find that Respondent's decision "involves a relocation of unit work."

The Dubuque decision also states that the relocation of unit work must be "unaccompanied by a basic change in the nature of the employer's operation." In Dubuque itself the Board concluded that the decision to relocate the employer's hog slaughtering operation did not constitute a "basic change" because the same basic functions would be performed at the new location, supra, 303 NLRB at 393. In Owens-Brockway Plastic Products, 311 NLRB 519, 522 (1993), the Board found that a relocation decision did not involve a change in scope and direction because the same machines were to be used at the new location, the same basic manufacturing process was to be employed, no other plants were closed and the employer continued to produce the same basic products. In addition, in Holmes & Narver, 309 NLRB 146, 147 (1992), the Board held that a subcontracting decision did not change the "scope and direction of the enterprise" because the employer did not abandon a line of business or cease a contractual relationship with any customers. In order for Respondent to show a "change in the scope and direction in the enterprise" it must establish a basic change in its business. I believe that closing the SAEP does not involve a basic change in the nature of Respondent's business. McMenamin testified that Allied is in the process of establishing the "capacity to produce in Phoenix the engines which heretofore have been produced in Stratford." Thus, Respondent will continue to produce the engines that had previously been produced in Stratford. The decision to relocate does not involve any change in products, customers, or methods of production. A consolidation of production, resulting in the elimination of one of many plants, is not a basic change. Owens-Brockway Plastic Products, supra, 311 NLRB at 522. Accordingly, I find that Respondent's decision to relocate is a "relocation of unit work unaccompanied by a basic change in the nature of the Employer's operation," Dubuque Packing Co., supra, and that

the General Counsel has made a prima facie showing that Respondent's decision is a mandatory subject of bargaining.

As a defense, Respondent maintains that labor costs were not a factor in the decision to relocate and that even if labor costs were a factor, the Union could not have offered concessions that could have changed Respondent's decision to relocate. I credit Kelly's testimony that at a meeting on August 31, 1995, Meshay asked him "whether or not the local union would be willing to . . . take a 10 percent cut." Kelly responded, "if the company agreed to accept the State's offer of economic assistance and stay here, that speaking on behalf of Local 1010 we were prepared to meet with the company and open the contract, and do whatever was necessary to make adjustments that would be satisfactory to both Allied Signal and our union members." McMenamin corroborated Kelly's testimony. Respondent anticipated \$30 million in savings from the relocation. Initially, Allied maintained that the bargaining unit payroll was only \$25 million. However, after subsequent testimony by McMenamin, Respondent stipulated that total labor costs for Local 1010 and Local 376 are approximately \$61 million, twice the savings that Respondent relied upon in making its decision to relocate. I conclude that Respondent has not shown by a preponderance of the evidence that labor costs were not a factor in its decision to relocate, or that even if labor costs were a factor, that the Union could not have offered concessions that could have changed the Employer's decision to relocate. Accordingly, I find that Respondent's notification to the Union on September 27, 1995, that it would relocate unit work to its Phoenix, Arizona facility, without affording the Union an opportunity to engage in decision bargaining, violated the Act.

3. Request for information

In Conrock Co., 263 NLRB 1293, 1294 (1982), the Board stated:

It is well settled that an employer has an obligation, as part of its duty to bargain in good faith, to provide information needed by a union to enforce and administer a collective-bargaining agreement. An employer must furnish information that is of even probable or potential relevance to the union's duties. The refusal by an employer to provide relevant information requested by the union is a violation of Section 8(a)(5) and (1) of the Act. [Footnotes omitted]

In a letter to Respondent dated July 31, 1995, Kelly requested 56 items of information. The Union acknowledged that it has received all of the documents relating to the request for information except for items 3, 6, 16, 30, 42, 43, 45, and 55. Item 3 requests information on work performed by bargaining unit employees which has been subcontracted or relocated. Item 6 requests documentation relating to the actual or estimated cost per employee for bargaining unit work performed at the Stratford facility. Item 16 requests the Respondent's financial statements. Item 30 requests a list of bargaining unit employees with the estimated earnings lost due to the reduction of employees. Item 42 requests a copy of the memorandum of understanding or purchase agreement of the sale of assets of Textron Lycoming to Respondent. Item 43 requests copies of current contracts with the military services for the procurement of engines and related parts and services. Item 45 requests copies of similar commercial contracts. Item 55 requests supporting data for Respondent's estimate of a savings of \$30 million annually by consolidating the Stratford work in Phoenix. Respondent refused to provide this information because it believed that the information was relevant to "decision" bargaining, but not to "effects" bargaining. Inasmuch as I have found that Respondent was required to engage in decision bargaining over the relocation of bargaining unit work from Stratford to Phoenix, I find that the information contains "probable or potential relevance to the Union's duties." *Conrock,* Id. Accordingly, the refusal by Respondent to provide this information is a violation of Section 8(a)(5) and (1) of the Act.

4. Amendment to the complaint

On the first day of hearing the General Counsel moved to amend the complaint to add certain allegations concerning employees represented by Local 376. Respondent objected. After affording Respondent an opportunity to file an opposition, on September 25, 1996, citing Redd-I, Inc., 290 NLRB 1115 (1988), I granted the General Counsel's motion. In Redd-I, Id. at 1116, the Board stated "Traditionally, the Board and the courts have allowed the General Counsel to add complaint allegations . . . if they are closely related to the allegations of the timely filed charge." Citing Jack La Lanne Management Corp., 218 NLRB 900, 913 (1975), enfd. 539 F.2d 292, 295 (2d Cir. 1976), the Board stated, "the Board has found complaint allegations closely related when they 'arise from the same factual situation, are of the same class as, and clearly related to, the [allegations] . . . set forth in the charge." With reference to Jack La Lanne, the Board stated (supra, 290 NLRB at 1116 fn.

In enforcing the Board's decision on this point, the Second Circuit stated that the additional complaint allegations "are all concerned with similar unfair labor practices designed to further the Company's common objective . . . represent "closely related" parallel conduct toward other employees . . . and constitute "the same class of violations as those set up in the charge."

Historically, Locals 1010 and 376 have conducted separate However, since 1976 the two collectivenegotiations. bargaining agreements have a common expiration date. The parties customarily engaged in what they referred to as a "tandem" bargaining process under which both locals would negotiate language issues and grievances simultaneously, but Local 1010 would establish the pattern for economic terms. The termination language of the two CAs is identical. The idea for the two CA's was initially put forward in a single meeting involving the International Union and the presidents of both locals. The termination letters from Respondent to the two local presidents are identical as are the two letters from the local presidents protesting the cancellations. I believe that the allegations relating to Local 376 are "factually and legally related" to the allegations regarding Local 1010. Accordingly, I reaffirm my decision granting the General Counsel's motion to amend the complaint.

CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The International and Local 1010 are labor organizations within the meaning of Section 2(5) of the Act.
- 3. The following employees of Respondent, members of Local 1010, constitute a unit appropriate for the purposes of col-

lective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time hourly paid maintenance and production employees and salaried plant clerical employees employed in the plant located in Stratford, Connecticut, or any extensions or additions to the existing plant, excluding executives, supervisory, managerial, confidential, professional, technical, office clerical employees, department confidential clerks, time study men, and all other salaried employees, guards and watchmen.

4. The following employees of Respondent, members of Local 376, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time office, clerical and technical salaried employees employed by Respondent at its facility in Stratford, Connecticut, excluding professional, plant clerical, production and maintenance, confidential, supervisory, buyers, all accounting department employees, reservationists, and salaried employees as were excluded in the proceedings in Case No. 2–RC–4663.

- 5. By notifying Locals 1010 and 376 on September 27, 1995, that Respondent would relocate unit work to its Phoenix, Arizona facility, without prior notice to the Union, and without affording the Union an opportunity to bargain concerning the decision to relocate such unit work, Respondent has violated Section 8(a(5) and (1) of the Act.
- 6. By failing and refusing to furnish the Union with the information requested by it on July 31, 1995, Respondent has violated Section 8(a)(5) and (1) of the Act.
- 7. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce, within the meaning of Section 2(6) and (7) of the Act.
- 8. The Respondent has not violated the Act in any other manner alleged in the complaint.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent violated the Act by notifying the Union that it would relocate its bargaining unit work to its Phoenix, Arizona facility, without affording the Union an opportunity to bargain concerning the relocation decision. The record does not show whether, in fact, any bargaining unit work has been transferred to Phoenix, or whether any equipment necessary for bargaining unit work in Stratford has been transferred. Neither does the record show whether any employees have been laid off because of the decision to relocate. I recommend that whether such transfer of work or of equipment, and whether employees were laid off because of the transfer, be left for the compliance stage of this proceeding. See Lear Siegler, Inc., 295 NLRB 857, 861 (1989); Flamingo Hilton-Reno, 321 NLRB 409 (1996). In the event that bargaining unit work has been transferred to Phoenix or that equipment necessary for bargaining unit work has been transferred, I shall order Respondent to restore the status quo ante by returning such work and such equipment to the Stratford facility. See Park-Ohio Industries, 257 NLRB 413, 415 (1981), enfd. 702 F.2d 624 (6th Cir. 1983). However, Respondent may introduce evidence at the compliance stage to demonstrate that the return of such work and of such equipment would be unduly burdensome. See *Flamingo Hilton-Reno*, supra, 321 NLRB at 409. In addition, if any employees were laid off because of the transfer, I shall order that Respondent immediately reinstate them to their former positions, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁵

The Union has recommended in its brief that I order the dismantling of the duplicate capacity which Respondent has created in Phoenix to produce the engines produced at Stratford. The Union has cited no case which would warrant such a drastic remedy. In addition, the Union requests that I order Respondent to honor the competitiveness agreement for a period

of time "equal to the period during which Respondent disregarded its obligations under that agreement." In support of this contention the Union cites Mar-Jac Poultry Co., 136 NLRB 785 (1962). I have found that Respondent did not violate the competitiveness agreement. In addition, I believe that Mar-Jac Poultry Co., supra, is not applicable inasmuch as it deals with the extension of the certification year. See Air Vac Industries, 282 NLRB 703, 713 (1987). Furthermore, the Union requests that I order Respondent to compensate it for the expenses incurred as a consequence of the cancellation of the competitiveness agreement. The Union contends that "Respondent's conduct in canceling the CA in blatant disregard of the understanding of the parties, constitutes . . . aggravated misconduct." As previously mentioned, I have found that Respondent did not unlawfully cancel the competitiveness agreement and I further find that Respondent did not engage in "unusually aggravated misconduct." See Frontier Hotel & Casino, 318 NLRB 857, 859 (1995). Accordingly, I deny the Union's request that Respondent be ordered to pay costs.

[Recommended Order omitted from publication.]

⁵ Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621.